SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 363

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.,
Respondents

No. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELE-
CASTERS, INC., AND JACK O. GROSS,
Petitioners

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.,
Respondents

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*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR SOUTHWESTERN CABLE CO. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App.A,[1] pp. 21-30) is reported at 378 F.2d 118. The Federal Communica-

[1] The petition for a writ of certiorari filed by the United States in No. 363 incorporates six appendices, designated A through F, inclusive.

tions Commission's (hereinafter referred to as "the Commission") memorandum opinion and order (Pet.App.C, pp. 33-65) is reported at 4 F.C.C.2d 612.

JURISDICTION

The judgment of the court of appeals (Pet.App.B, pp. 31-32) was entered on April 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350.

QUESTION PRESENTED

Whether the Commission has authority without a hearing to restrain for an extended period of time the operation of particular CATV systems which are conceded to comply with the governing statute and the Commission's rules relating to the operation of CATV systems pending a protracted evidentiary hearing to determine if their operations should be made subject to permanent *ad hoc* "additional or different requirements" than those imposed upon CATV systems generally by the Commission's rules.

STATUTES INVOLVED

Sections 4(i), 303(f), 303(r), 312(b), 312(c), 312(d), 312(e) and 316 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 154(i), 303(f), 303(r), 312(b), 312(c), 312(d), 312(e) and 316, are set forth in Appendix A, hereof, *infra,* pp. 25 to 27.

That petition is referred to herein as "Pet." and its various appendices as "Pet.App.A", etc. The petition for a writ of certiorari filed by Midwest Television Inc., San Diego Telecasters, Inc., and Jack R. Gross in No. 428 is referred to as "TV Pet." In addition, "R." is used to refer to respondents' appendix in the court of appeals, ten copies of which have been lodged with the Clerk of this Court.

STATEMENT

The proceeding here involved was initiated by a petition filed with the Commission on March 17, 1966, by Midwest Television, Inc. (hereinafter referred to as "Midwest"), licensee of Station KFMB-TV, San Diego.[2] In summary, Midwest's petition was directed to obtaining a final order from the Commission "appropriately confining carriage of Los Angeles television signals" (Pet.App.C, pp. 33-35, 39) by respondents. All of the respondents are CATV systems, and all had obtained CATV franchises from communities in the San Diego area and had commenced operations prior to February 15, 1966.[3] Therefore, all were actually in operation before the Commission had undertaken to regulate non-microwave CATV systems pursuant to its *Second Report and Order* of March 4, 1966 (2 F.C.C.2d 725; R.49, *et seq.*), and before the effective date for the recognition of grandfather rights relating to the carriage of distant signals under the Commission's regulations (Pet. 3-8; Pet.App.A, pp. 22-23).

However, the rules adopted by the Commission in conjunction with the *Second Report and Order* contain an open-ended reservation of authority to impose upon a particular CATV system "additional or different requirements" than those contained in the rules relating to the operations of CATV systems generally upon receipt of a petition filed by an interested person, including the licensee of a television station. When such a petition is filed, an evidentiary hearing may be held in the discretion of the Commission. If it determines that one is required it will also determine "whether temporary relief should be accorded to any party pending the hearing and the nature

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[2] Thereafter the licensee of another San Diego television station and the holder of a television construction permit became parties in the proceeding before the Commission, supporting Midwest.

[3] Respondent, Southwestern Cable Co. (hereinafter referred to as "Southwestern"), began service to subscribers on December 22, 1965, pursuant to a franchise issued to it effective October 30, 1964, by the City of San Diego in an area lying north of the San Diego River channel.

of any such temporary relief" (47 C.F.R. 74.1109(a), (f); Pet. App.F, pp. 89, 91).[4] As the Commission later conceded in connection with the issuance of an interlocutory injunction by the Ninth Circuit on August 23, 1966, none of the respondents "is presently in violation of the governing statutes and Commission rules" relating to the operation of CATV (App. B, *infra*, p. 28). Nor does either of the petitions for certiorari contend that any such violation is here in issue. Midwest's petition was therefore directed at the imposition of such "additional or different requirements" upon respondent CATV systems.

All of Midwest's contentions were denied or opposed by the respondents in various pleadings and supporting documents filed with the Commission (Pet.App.C, p. 34); and the Commission by memorandum opinion and order, released July 25, 1966[5] designated the matter for hearing "pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules." The order enumerated and set out specific issues to be covered in the hearing relating to the present and potential penetration of CATV service in the San Diego market, its affect or potential affect on local television stations, whether or not expansion of the respondent CATV systems should be limited and what, if any, action should be taken by the Commission. (*ibid.*, pp. 58-60)

Pursuant to the Commission's order, hearings commenced on December 12, 1966. Pre-hearing conferences were held

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[4]Similarly, Section 74.1107(d) of the Commission's rules (47 C.F.R. 74.1107(d)) provides with respect to the extension of services by CATV systems in operation before the adoption of the rules:

> "... The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief."

[5]An errätum to the memorandum opinion and order was released on July 25, 1966 (*ibid.* pp. 62-65).

on September 9 and 30 and December 2, 1966. Hearings were held on the following days: December 12 through 16, 1966; December 19 through 21, 1966; February 6 through 10, 1967; February 13 through 16, 1967; March 20 through 24, 1967; March 26 and 27, 1967; and April 7, 1967. The record was closed on April 7, 1967, and was subsequently reopened for further hearings which were held on July 10 through 12, 1967. The record was finally closed on the latter date. Proposed Findings of Fact and Conclusions of Law were filed on August 11, 1967.[6] Following the release of the Hearing Examiner's Initial Decision, that decision will be reviewed by the Commission pursuant to Section 1.276 of its Rules (74 C.F.R. 1.276), and presumably a final order will then be issued.

In its petition Midwest also requested that if a hearing should be ordered the Commission should issue, pending final disposition, a "cease and desist" order or an order for "temporary relief" which would "confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographical areas where the [CATV] systems were operating on February 15, 1966" (Pet.App.C, pp. 33-35, 39). The CATV systems objected strenuously to the equities of a grant of Midwest's request for the issuance of such a "cease and desist" order or order for "temporary relief" (*ibid.* pp. 41, 43-44). Respondent Southwestern alleged that Midwest had failed to show it would be irreparably injured without such interim relief, but that the grant of interim relief would dry up Southwestern's financing.[7] And, indeed, the court below

[6]Federal Communications Commission, Docket No. 16786.

[7]Installation of Southwestern's system required a considerable expenditure of time, effort and money. Among other things, these include obtaining pole attachment agreements with the local telephone and gas companies, the location, acquisition and construction of an antenna and head-end site, the acquisition and installation of equipment and obtaining necessary financing through bank loans related to the expansion of operations in accordance with the projected development of demand for its service within the franchise area.

later issued its interlocutory injunction in part because of Southwestern's "present financial difficulties" and because it would "lose substantial and irretrievable gross income" and might "be forced to suspend all operations" (App. B, *infra*, p. 28)

Nevertheless, the Commission did provide in its order for "temporary relief pending final disposition of this proceeding" substantially as requested by the television stations. The order requires that "pending the outcome of this proceeding" the CATV systems must confine delivery of Los Angeles signals within the franchise areas in which they were operating on February 15, 1966. Outside those areas Los Angeles signals may only be delivered to subscribers who either had begun receiving service or who had contracted for such service between February 15, 1966, and the date of the order. (Pet.App.C, pp. 56-58, 60) This action was taken on the basis of the pleadings and supporting documents without a hearing and after denial of respondents' request for oral argument (*ibid.*, p. 61). In its interlocutory injunction of August 23, 1966, the Ninth Circuit limited the Commission's order as it affected the addition of new subscribers to CATV trunk and feeder lines actually in existence as of August 23, 1966. (App.B, *infra*, p. 28) Therefore, subject to that modification, the respondents have been operating for over a year pursuant to restrictions imposed upon them by the Commission without either a hearing or an oral argument.

In connection with this order for "temporary relief" the Commission expressly rejected the respondents' contention that Section 312 of the Communications Act constitutes the only basis for a stay pending a hearing, and, since the procedures required by that section had not been followed, the Commission lacked the authority to take such interim action. The Commission concluded, instead, that the imposition of a stay pursuant to the temporary relief provisions of Sections 74.1107 and 74.1109 of its rules constitutes a valid exercise of the authority conferred upon it by Section 4(i) of

the Act to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act as may be necessary to the execution of its functions." It also referred to similar general regulatory provisions of the Act, Sections 303(f) and (r), as support for this general authority. (Pet. App. C, pp. 62-63)

Moreover, the Commission expressly considered, as a possible alternative procedure, seeking an injunction "in order to preserve our jurisdiction to enter an effective order after a hearing" under the authority of *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966). However it rejected this course on the asserted ground that it "would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission." (Pet.App.C, p. 63)

Southwestern, as did the other CATV systems involved in a separate petition, sought review of the order in the Court of Appeals for the Ninth Circuit. That Court consolidated the actions and permitted Midwest and the other television broadcasting interests to intervene. Preliminarily, on August 23, 1966, the Court issued the interlocutory injunction referred to above. It took this action in part because of the order's grave financial impact on Southwestern and in part because of the Commission's concession "that none of the petitioners [respondents here] is presently in violation of the governing statutes and Commission rules with respect to any of the matters dealt with in the described Commission order,..." (App.B, *infra*, p.28). Thereafter on April 28, 1967, that court issued its opinion here sought to be reviewed. It concluded that the Commission lacked the power to issue its order for temporary relief pending a hearing and, to that extent, set the order aside (Pet.App.A, pp. 21-30). The court did not, however, reverse that portion of the Commission's order designating the controverted issues for hearing. That hearing has been in process for over a year.

Since the Commission had not invoked the procedures required by Section 312[8] in connection with the issuance of its order for temporary relief, it relied in court solely upon Sections 4(i) and 303(r) of the Act. However, while the court recognized that the latter provisions are intended "to provide the Commission with a degree of flexibility in performing its important tasks", it concluded that they "are to be measured by the Act and its structure and purpose" (*ibid.*, p. 25). Viewing licensing to be central to the regulatory scheme established by the Act, it concluded "that Sections (4(i) and 303(r) are limited to the scope of the Commission's licensing authority" (*ibid*, p. 29). In support of its conclusion the court stated:

> "The logic of our conclusion seems to us inescapable. If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. Cf. *United States v. National Plastikwear Fashions, Inc.*, 123 F. Supp. 791 (S.D.N.Y., 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power." *(id.)*

Both in the proceedings before the Commission and those before the court the CATV systems "specified many grounds

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[8]Section 312(b) of the Act authorizes the Commission to issue cease and desist orders against persons who have failed to operate as licensed or have violated or failed to observe the provisions of the Act or designated provisions of the Criminal Code or validly issued rules and regulations of the Commission. Section 312(c) requires that the issuance of such an order must be preceded by service of an order to show cause and, unless waived, by a hearing. Section 312(d) provides that "where a hearing is conducted both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission."

for setting aside the Commission's order, some of constitutional dimension" (Pet.App.A, p. 24). As to these contentions, however, the court expressly stated: "In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding" (*ibid.*, p. 29).

SUMMARY OF ARGUMENT

The petitions for certiorari should be denied because:

(1) The instant case does not involve any question of substantial significance concerning the basic power of the Commission to regulate CATV systems. The holding below is in fact narrow in scope and limited in application, for the court left intact that portion of the Commission's order which directed an evidentiary hearing aimed at determining whether the respondent CATV systems should be made subject to *ad hoc* "additional or different requirements" than those imposed upon CATV systems generally, and that hearing has proceeded. Accordingly, the Court left it open to the Commission after the conclusion of the hearing to impose upon the respondents permanent restraints of the type now only "temporarily" imposed. The opinion below is directed only to the question whether the Commission may —without hearing or oral argument—issue an order designated as one for "temporary relief" but in fact restraining the concededly legal operations of the respondent CATV systems for an extended period of time, pending a protracted evidentiary hearing as to whether their operations should be made subject to permanent *ad hoc* "additional or different" requirements. The instant case is the only one now before the courts relating to the regulation of CATV which involves so narrow a procedural question rather than the ultimate issues relating to the Commission's authority to regulate CATV.

(2) Any decision this Court may reach will be moot if, after the termination of the hearing and before this Court reaches its decision, the Commission either vacates the order for "temporary relief" or supersedes it with a permanent

order. Even if such Commission action follows rather than precedes this Court's decision, the decision will, at most, be in effect for a very brief period.

(3) The decision below is clearly supported by the language and structure of the Communications Act, by its interpretation and application by the Commission itself and by other relevant authority concerning the power of regulatory agencies to issue interim stay orders designed to protect the ultimate exercise of their powers. The Commission may not issue a cease and desist order against a licensee accused of violating the terms of his license or the Act or the Commission's rules. It may not therefore take such action against a non-licensee not accused of violation of the Act or the Commission's rules. Moreover, in order to reverse the decision below—if the petitions for a writ of certiorari should be granted—this court would have to hold that the Commission has the authority to restrain, without a hearing or even oral argument, concededly lawful activity pending a Commission decision as to whether it should permanently impose limitations on that activity not otherwise imposed by law or its rules.

(4) The decision below is not in conflict with a decision of any other circuit. *Buckeye Cablevision Inc. v. Federal Communications Commission,* No. 20,274, C.A.D.C., June 30, 1967 (Pet.App.D, pp. 67-80), deals with a permanent cease and desist order issued by the Commission after a hearing pursuant to Section 312(b) of the Communications Act. The instant case involves only the validity of an order for "temporary relief" issued by the Commission prior to holding a hearing. If the Commission, after the completion of the hearing and related proceedings involved in this case, issues a permanent cease and desist order against the respondents and the Ninth Circuit vacates such a permanent order, issues involving the basic authority of the Commission to regulate CATV may be presented and a conflict may exist with *Buckeye.* Neither are presented by the interlocutory order here in issue.

ARGUMENT

I

The court below defined the threshold question in this case to be whether the Commission had the power to issue its order for "temporary relief", and, having found an absence of such power, declined "to express any opinion as to the other issues raised in this proceeding." (Pet.App.A, p. 29) And, suiting its action to its definition of the issue it was deciding, the court vacated only that portion of the Commission's order of July 25, 1966, providing for temporary relief. It did not vacate that portion of the Commission's order directing that a hearing be held. That hearing has continued. Nothing in the court's order prevents the Commission, if it deems it appropriate after the hearing is concluded, from then imposing "additional or different requirements" upon the respondent CATV systems. If it should do so, the broad question of the Commission's "jurisdiction to regulate non-microwave community antenna television (CATV) systems" (Pet., p. 2; see also TV Pet., p. 2) may be ripe for judicial review. That question was not decided below and is not presented here.[9]

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[9] In *Valley Vision, Inc. v. United States* (Nos. 61869, 21870, C.A. 9, Order of June 29, 1967), the Ninth Circuit stayed, pending review by it, a cease and desist order issued by the Commission against a CATV system allegedly operating in violation of the distant-signal rules. Because the Ninth Circuit cited its opinion in this matter in the stay order, it is suggested that that court has accorded a broad reading or construction to the opinion. We do not question the view that difficult and important problems of law are involved in the Commission's regulation of CATV systems or that some of these problems were reflected—but not decided—below. Nevertheless the issuance by a court of a temporary stay pending decision involves a complex of legal and equitable considerations. The mere reference in the three-sentence stay order to the court's opinion in this case does not, therefore, justify the inference that it reads the opinion as deciding ultimate issues as to the Commission's jurisdiction over CATV. Moreover, the cease and desist order stayed in *Valley Vision* was a final order not an interlocutory one, and was issued pursuant to Section 312(b), after a hearing and upon a determination

Indeed, until the Government's petition was filed, even the Commission construed the opinion below as relating only to its order for "temporary relief." After the opinion below was issued the respondent CATV systems petitioned the Commission to terminate the hearing. In the alternative they requested a stay of the hearing pending a determination whether further review of the decision would be sought and, if so, pending the disposition of such further review. The Commission denied both requests. In its order of denial it stated:

> "Petitioners have misconstrued the Court's decision. In paragraphs 24-26 of our designation order, FCC 66-683, 4 F.C.C.2d 612 [8 R.R.2d 278], released July 25, 1966, we placed temporary restrictions upon the expansion of the CATV systems pending final disposition of this proceeding. The Ninth Circuit Court's decision vacated and set aside our order only 'to the extent that it limits the operations of the petitioners [the CATV systems] as set forth in paragraphs 24-26 of that order' (slip opinion, p. 10). The request for termination of the proceeding must therefore be denied. The alternative request for a stay of the hearing during the pendency of any action for review of the Court's decision would be inconsistent with the public interest which requires the expeditious resolution of the issue designated for hearing, and that request must also be denied."[10]

It is, of course, true that the comparatively recent development of CATV has raised significant and difficult problems concerning its impact upon and relationship with other

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that the Commission's rules relating to the operation of CATV systems were being violated. *Valley Vision, Inc.*, 10 Pike & Fischer R.R. 2d 83 (1967). Conceivably, that case may provide a vehicle for judicial review of the Commission's ultimate authority over CATV systems. In its present posture the instant case does not.

[10] Order of May 17, released May 23, 1967. Docket Nos. 16786, 17008; *Midwest Television, Inc.*, 10 Pike & Fischer R.R. 22, 23 (Footnote omitted).

media—primarily television broadcasting. In view of the far-reaching significance of many of the problems involved, they have been the subject of consideration in a variety of forums, including the state[11] and federal[12] legislatures, the Commission and the federal courts. Those problems include—with respect to private relationships—the liability of CATV systems for engaging in performances purportedly in violation of Section 1 of the Copyright Act (17 U.S.C. 1). *United Artists Television Inc. v. Fortnightly Corp.*, __ F.2d __, 153 USPQ 696, 9 Pike & Fischer R.R.2d 2083 (C.A. 2, May 22, 1967.

Of course the Commission and therefore the federal courts are presented with a series of related and important questions concerning the existence of the former's regulatory authority and the statutory and constitutional validity of particular aspects of its regulatory efforts. Some indication of the extent of the problems is provided by the list, contained in the Government petition (Pet.App.G, pp. 93-95), of CATV cases now pending in the courts of appeals. The issues involved in completed and pending cases include Commission jurisdiction with respect to both microwave carriage for CATV[13] and the Commission's jurisdiction over CATV generally. Thus the Government's petition notes no less than 11 cases now pending in the courts of appeals (Pet., p. 16, Pet.App.G, pp. 93-95) involving the latter question. Such cases ordinarily arise in the context of Commission ac-

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[11] See, e.g., Conn. Pub. Act 425, 1963, requiring the receipt of a certificate of public necessity and convenience from the State Public Utilities Commission prior to the construction or operation of a CATV system.

[12] See, e.g., in the 90th Cong., 2d Sess., H.R. 2512 (as introduced), § 111; H. Rept. No. 83, pp. 6-7, 48-59; and Cong. Rec. pp. H3642-H3643 (Daily Ed., April 6, 1967); all concerning copyright protection and CATV carriage of local and distant signals.

[13] *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F.2d (C.A.D.C. 1963), certiorari denied 375 U.S. 951 (1963).

tion directed at a CATV system allegedly operating in violation of its rules, e.g., *Buckeye Cablevision Inc. v. Federal Communications Commission,* No. 20,274, C.A.D.C., June 30, 1967; Pet.App.D, pp. 67-80. However, some request direct review of the rules adopted in conjunction with the issuance of the *Second Report and Order.* See, e.g., *Black Hills Video Corp. and Midwest Video Corp. v. United States of American and Federal Communications Commission,* Nos. 18052, 18348, C.A. 8. Nor are the issues limited simply to the jurisdiction of the Commission. The cases also deal with the validity of particular methods of its exercise. Both *Buckeye* and *Black Hills* involve questions as to the validity of the non-duplication and distant-signal rules under the First Amendment, even assuming Commission jurisdiction.

None of these basic questions involving the Commission's jurisdiction and authority, or the constitutional validity of its rules, is presented in this case. On the contrary, the decision below is directed solely to one narrow question—the power of the Commission to issue an order without hearing or oral argument restraining the concededly legal activities of parties before it for an indefinite period of time pending the conclusion of a hearing and the issuance of a final order. The question is obviously not one involving basic issues concerning the regulation of CATV systems or their private liability now being considered in other courts and other forums.[14] In fact, the instant case is the only one now pending in the courts involving the authority of the Commission to issue an order for "temporary relief".

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[14]Had the substantive question been reached below it would have involved a situation in which the Grade B contours of television stations in one major market overlap another major market. This is a situation which the Commission described in the *Second Report and Order* as "the rarest exception." It stated that such "instances rarely arise." (R. 110; 2 F.C.C.2d at 786) Accordingly, even the substantive question here involved is hardly of the same order of significance as other questions relating to the Commission's regulation of CATV.

II

In the present posture of this case it is likely that a decision by this Court upon review will either be moot or will be operative for only a limited period of time. As set forth above, the evidentiary portion of the hearing directed by the Commission has finally been concluded; and following the Hearing Examiner's initial decision, the matter will be ready for review and final decision by the Commission. Such final action will either (1) supersede the order for "temporary relief" with an order requiring the respondent CATV systems *permanently* to operate subject to *ad hoc* restrictions "additional or different" to those now required by the rules; or (2) will result in a determination not to impose such restrictions upon them. Accordingly, whatever its nature, if the final action of the Commission is taken before this Court reaches its decision, such decision will have been rendered moot by the Commission action. And even if final action is not taken by the Commission until after the decision of this Court, the decision will be operative only for the limited interval between this Court's decision and the Commission's final action. Of course, if this Court should review this case and decide it in favor of the respondents, they will no doubt have the satisfaction of having established a legal principle. They are not, however, likely to reap any other benefit from the vindication of their rights by the highest court of the land—some year and a half after the Commission conceded that they are not "in violation of the governing statutes and Commission rules. . .".

Moreover, if the Commission's final order does impose restrictions on respondents' operations, there will be presented for judicial review an order of permanent rather than transitory impact and one based upon a full hearing. At that point the case will be ripe for judicial review of the Commission's authority to regulate CATV systems in whatever manner may be provided for in the final order.

III

The evidentiary hearing which the Commission ordered and which is still in process is designed to determine whether "additional or different requirements" should be imposed on an *ad hoc* basis upon respondent CATV systems, which are not licensees of the Commission, even though it is conceded that those systems are operating in accordance with the Communications Act and the Commission's rules. Even if the respondents were licensees of the Commission accused of violating the terms of their licenses or the Communications Act or the Commission's rules, the Commission would lack the power to restrain their operations except after a full evidentiary hearing and a determination that such violations have in fact occurred. This is made clear by the governing general legal principle; by the judicial authority concerning similar attempts of other regulatory agencies temporarily to restrain activities pending a hearing to determine the existence of violations of law or regulation; by the Communications Act itself; by the publicly expressed views of the Commission; and by its actual practice. It follows that the Commission has no greater authority with respect to respondents who are not licensees of the Commission and who are not accused of any violation of its rules or of the statute.

The general rule respecting the power of a regulatory agency to issue interim restraining orders pending a hearing on the actual existence of a violation is that:

> "Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decisions. Absent such statutory grant, however, it does not appear that a Federal administrative agency can issue such orders, regardless of the harm which may occur pending its decision or the possible inefficacy of orders it may enter after decision." Jaffe, *Judicial Control of Administrative Action*, 662 (1965) (Footnote omitted).

Trans-Pacific Frght. Conf. of Japan v. Federal Maritime Bd., 302 F.2d 875 (C.A.D.C., 1962), is a representative illus-

tration of this rule. In that case the Federal Maritime Board had set for a hearing an alleged violation of Section 22 of the Shipping Act (46 U.S.C. 821) and had ordered the allegedly violating shipping conference and its agent to cease and desist from taking the actions complained of "until the Board issues a final order in this proceeding." 302 F.2d at 877. The court reversed, pointing out that the interim order which the Board issued was "akin to judicial injunctive power . . . But the Board is not a court and cannot rely for its action on the powers of a court of equity."[15] 302 F.2d at 880. The court failed to find any express power in the general provisions of the Shipping Act to issue such an interim order and emphasized that:

> "Congress has repeatedly demonstrated that it knows how to make an express delegation of authority to issue interim cease and desist orders when it so desires. See, e.g., 15 U.S.C.A. § 45(b) (Federal Trade Commission); 16 U.S.C.A. § 820 (Federal Power Commission); 29 U.S.C.A. § 160(c) (National Labor Relations Board); see also Shipping Act § 17, 46 U.S. C.A. § 816. Frequently, Congress has expressly provided that an agency can obtain this form of relief by applying to an appropriate District Court. See, e.g., 15 U.S.C.A. §§ 53(a), 68e(b), 69g(b), 70f (Fed-

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[15] In the instant case the Commission deliberately decided not to seek "an immediate injunction" under the All Writs Act (28 U.S.C. 1651(a)) and the doctrine of *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597 (1966), because it regarded "interim action" by the Commission itself to be "preferable." (Pet.App.C, p. 63). There does not exist with respect to the Federal Communications Commission the special statutory scheme of the Clayton Act and history of legislative treatment which led the dissent in *Dean Foods* to conclude that in the circumstances there involved injunctive relief was available only in the district courts in an action instituted by the Attorney General; and the Commission's language indicated no doubts as to the availability to it of injunctive relief under the All Writs Act. In effect, therefore, the Commission decided it was "preferable" that it rather than the courts exercise "the powers of a court of equity."

eral Trade Commission); 49 U.S.C.A. §§ 5(8), 43 (Interstate Commerce Commission)." *id.*

See also *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (C.A.D.C., 1949) holding that in the absence of express statutory authority, the CAB could not suspend a letter of registration granted an irregular air carrier pending a hearing.

The Communications Act itself is an example of Congress knowing "how to make an express delegation of authority to issue interim cease and desist orders : . ." Thus, with respect to the Commission's rate making authority over common carriers Section 204 of the Act (47 U.S.C. 204) expressly authorizes it to suspend the operation of charges and similar tariff provisions filed with it pending a hearing ". . . but not for a longer period than three months . . ." In contrast, under Section 303(m) of the Act, radio operators' licenses may be suspended in specified circumstances upon fifteen days' notice, but the suspension must be "held in abeyance" if an application for a hearing is made within the fifteen day period. In similar contrast is Section 312(b), the only provision of the Act which confers general power to issue cease and desist orders for the failure to operate as licensed or to observe the terms of the Act or of "any rule or regulation of the Commission authorized by this Act . . ." However, issuance of the order must be preceded by an evidentiary hearing, unless waived (§ 312(c)), at which "both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission . . ." (§ 312(d)).

Moreover, the Commission itself has made it clear that the procedures established by Sections 312(b) and (c) are to be followed with respect to alleged violations of its rules governing the operation of non-microwave CATV systems. The Commission included in the *Second Report and Order* a paragraph entitled *"Form and enforcement of the new rules."* There it recognized that non-microwave systems are not licensed by it. However it expressed the view that the

same substantive requirements could, nevertheless, be imposed both upon microwave and non-microwave CATV systems. The Commission stated:

> "While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the non-microwave CATVs. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312(b) and (c), or pursuant to section 502, of the act [47 U.S.C. 502, providing for criminal prosecution and fine] and will not include the other sanctions applicable to licensees." (R. 90; 2 F.C.C.2d at 766)

And, of course, Section 312 procedure was followed by the Commission in *Buckeye*, 3 F.C.C.2d 798 (1967), and in *Valley Vision Inc.*, 10 Pike & Fischer R.R.2d 83 (1967). Like the instant case initially, each of these matters involved alleged violations of the distant-signal rules by a CATV system and in each the Commission prescribed measures to provide an expeditious resolution of the matter after a hearing. See also *Mission Cable TV, Inc. and Transvideo Corp.*, 7 Pike & Fischer R.R.2d 419 (1966); *Muskegon Television System and Booth Communications Co.*, 7 Pike & Fischer R.R.2d 415 (1966).

The foregoing demonstrates the Commission's lack of power to restrain allegedly prohibited activities pending completion of an evidentiary hearing as to the actual existence of the charged prohibited activities. It would follow that it certainly does not have the power to issue such an interim restraining order where it is conceded that no prohibited activity has occurred. While there is a paucity of authority as to interim restraining power in a regulatory agency in the absence of a charge of a violation, the lack is easily explainable. It is unheard of to vest in a regulatory agency power to restrain conceded legal activities pending an evidentiary

hearing to determine whether those legal activities should thereafter be permanently restrained on an *ad hoc* basis. Yet, that is the only purpose of the Commission's order for temporary relief in this case.[16]

The proposition that the Commission has authority temporarily to restrain—if indeed temporarily is the appropriate term in the present context—legal activities pending a hearing as to whether they should be permanently restrained or limited becomes even less supportable in the contest of the Communications Act. The provision of the Act most closely designed to deal with a situation approximating the one here presented is Section 316(a). That provision authorizes the Commission to "modify a station license or construction permit" it has issued if, among other reasons, the Commission determines that "such action will promote the public interest, convenience, and necessity, or the provisions of this Act." This power to modify is, for example, available when the Commission has discovered it has permitted a station licensee to transmit signals in a manner that interferes with other legitimate uses of the radio spectrum. The principal difference between such a situation and that here presented is that here the CATV systems are not "licensees." Nevertheless, Section 316(a) expressly requires that before the Commission modifies a license the licensee must be accorded a hearing if he so requests; and Section 316(b) provides that at the hearing "both the burden of proceeding

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[16] The system which the Commission has adopted to regulate CATV in major markets involves both general rules and *ad hoc* "particular orders". (Pet. 17-18). There may, indeed, be serious question as to the Commission's authority to issue such a "particular order" to the extent that it imposes "additional or different requirements" upon a CATV system not in violation of the rules. However that question will not be presented in the instant case unless the hearing now in progress culminates with the issuance of such an order. In the present posture of the case the only question presented is the Commission's authority to impose interim restraints pending its decision as to whether it should ultimately issue such a "particular order."

with the introduction of evidence and the burden of proof shall be upon the Commission" (App. A, *infra*, p. 25).

Accordingly, Section 312 of the Act spells out in specific detail the procedures to be followed by the Commission before it may restrain alleged violations of the Act or of the Commission's rules or of the terms of licenses it has issued. In addition, Section 316 permits the Commission to modify the terms of an outstanding license to "promote the public interest, convenience, and necessity . . ." In each case, if requested, a hearing is required, even "where safety of life or property is involved", at which both the burdens of proceeding and of proof are upon the Commission. The Act therefore deliberately establishes procedures to deal with violations of its provisions or of the Commission's rules or of licenses it has issued. It also covers the modification of previously licensed authority and thereby provides for the imposition of *ad hoc* restrictions on the operations of licensees. None of the procedures so carefully defined permit the Commission to issue interim restraining orders pending a hearing —whether it is directed to the existence of a violation or whether it is directed to the propriety of the modification of a previously issued license. In the light of this statutory scheme the court below was clearly correct in holding that the general rule-making and regulatory provisions of Sections 4(i) and 303(r) conferred no more extensive or arbitrary authority upon the Commission to restrain—pending a protracted hearing—the admittedly legal activities of non-licensees.

IV.

Is it contended (TV Pet., p. 10) that the decision below is in conflict with *Amerada Petroleum Corp. v. Federal Power Commission*, 293 F.2d 572 (C.A. 10, 1961), certiorari denied 368 U.S. 976 (1962), and *R. A. Holman & Co. v. Securities and Exchange Commission*, 299 F.2d 127 (C.A.D. C., 1962), certiorari denied 368 U.S. 976 (1962). However, each of these cases deals with a particular grant of power in

a highly specialized area of regulation, and neither conflicts with the decision below.[17]

The opinion of the District of Columbia Circuit in *Buckeye, supra,* is the primary basis for the contention (Pet. p. 11; TV Pet., p. 8) that the decision below establishes a conflict of circuits. *Buckeye,* however, does not present such a conflict because no question of the power of the Commission to order temporary relief, pending a hearing and decision on the merits, was there presented. Rather, in *Buckeye* a cease and desist order was issued after compliance by the Commission with Section 312 procedures. That case involved an alleged violation of the distant carriage rules by a CATV system, an order "to show cause why it should not be ordered to cease and desist from further operation in violation of Section 74.1107 of the Commission's rules . . .", an expeditious evidentiary hearing disclosing no serious dispute as to the essential facts, a determination that the CATV system was in fact operating in violation of the rules and the issuance of a cease and desist order. *Buckeye Cablevision Inc.,* 3 F.C.C.2d 798, 799, 801, 806 (1966).

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[17] *Amerada* involved an interpretation of Section 4 of the Federal Power Act (15 U.S.C. 717c), which requires natural gas companies regulated under the Act to file notices of rate changes with the Federal Power Commission and authorizes that agency to suspend proposed rate changes for a five-month period. The case merely held that the system of rate regulation established by Section 4 operates to prevent a regulated natural gas company from making additional rate changes during a period when prior rate changes relating to the same gas are suspended. *Holman* involved the revocation with respect to a particular issue of stock of the exemption of offerings of $300,000 or less from the principal registration provisions of the Securities Act of 1933, pending a hearing as to whether violations of the Act or the regulations had in fact occurred. The court's decision confirming the SEC's authority to suspend the exemption for that purpose was based on the fact that the existence of such powers with respect to financial transactions affecting the public has been generally recognized and that Congresss in fact contemplated that the SEC would exercise such powers.

Since no question was raised as to the procedure followed in *Buckeye*, the District of Columbia Circuit properly concluded that the "threshold question of first impression is whether the FCC has jurisdiction to regulate those CATV systems which employ no microwave transmission" (Pet.App. D, p. 70). *Buckeye* was decided on June 30, 1967, more than two months after the instant case. The court's description of the issue before it as one "of first impression" and its failure even to refer to the instant case makes it appropriate to infer that the court—like the Commission approximately six weeks earlier on May 17—properly construed the instant case as being concerned only with the power of the Commission to issue the order for "temporary relief" here involved.

It may be that upon the conclusion of the Commission's hearing in the instant case, a final order will be issued restraining or confining the operations of the respondent CATV systems. Conceivably review of that order will be sought in the Ninth Circuit, and conceivably that court will reverse on grounds inconsistent with the opinion in *Buckeye*. However none of those contingencies has yet occurred; none may ever occur. If all of such contingencies should eventuate, review by this Court on the ground of the existence of a conflict in circuits will be appropriate. Unless and until all of those events do occur review on that ground is plainly premature. *Buckeye* does not deal with the Commission's interim power to restrain legal activities pending a hearing as to the imposition of more permanent restraints—the only issue dealt with by the court below in this case. And the court below did not deal with the ultimate power of the Commission to regulate the activities of non-microwave CATV systems—the principal issue presented in *Buckeye*—or, indeed, with any other issue decided in that case.

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COMMUNICATIONS ACT OF 1934

Sec. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Sec. 312(b). Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States

Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden or proof shall be upon the Commission.

(e) The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

Sec. 316(a). Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO.,
Petitioner,
v.
UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

No. 21183

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and TRANS-VIDEO CORP.,
Petitioners,
v.
UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

No. 21192

Interlocutory Injunction

Before: HAMLEY, BROWNING and DUNIWAY,
Circuit Judges

Southwestern Cable Co., having petitioned this court, pursuant to section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. § 402(a) (1964), and sections 2 and 3 of the Judicial Review Act of 1950, as amended, 64 Stat. 1129 (1950), 5 U.S.C. §§ 1032, 1033 (1964), to review the Memorandum Opinion and Order of the Federal Communications Commission (Commission) released July 25, 1966, as corrected in an Erratum released July 26, 1966; and

Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp., having likewise petitioned this court, and pursuant to the same statutes, to review the described order of the Commission; and

All petitioners having applied to this court, pursuant to section 9(b) of the Judicial Review Act of 1950, 5 U.S.C. § 1039, to issue an interlocutory injunction staying the effectiveness of the described order of the Commission, pending final disposition of the petitions to review, and having obtained from a judge of this court, on August 10, 1966, orders staying the following portions of the described Commission order:

> "IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp, ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26 *supra.*"

insofar as the quoted portion of the order refers to petitioners and to paragraphs 25 and 26, with the proviso in each such stay order, that the same is subject to reconsideration by this court in the event that respondent Commission files with this court its objections to the relief granted herein within thirty days of the date of the stay orders; and

United States of America and the Commission, respondents herein, having timely filed a motion for reconsideration of the stay orders and their opposition to the granting of an interlocutory injunction herein, and the matter having come on for hearing before this court on August 22, 1966, on due notice, all petitioners and respondents being represented by counsel; and the court having granted the motion of respondents to consolidate the two review proceedings for all purposes; and having granted the motions of Midwest Television, Inc., Jack O. Gross, and San Diego Telecasters, Inc., for leave to intervene in the consolidated proceedings; and the intervenors having filed a joint opposition

to the application for an interlocutory injunction, and being represented at the hearing by counsel; and

The court finding, on the basis of affidavits of Richard A. Moore and K. C. Hawkins attached to the application of Southwestern Cable Co. for an interlocutory injunction, and the affidavit of K. C. Hawkins attached to Southwestern Cable Co.'s opposition to motion for reconsideration, that if that petitioner is required, pending the disposition of this review proceeding, to desist from adding new subscribers to its presently existing trunk and feeder lines, it in all probability will be unable to extricate itself from its present financial difficulties and may be forced to suspend all operations; and in any event will lose substantial and irretrievable gross income, thereby causing irreparable damage; and

The court further finding, on the basis of the affidavit of Henry R. Goldstein, attached to the application of Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp., that if those petitioners are required, pending the disposition of this review proceeding, to desist from adding new subscribers to their presently existing trunk and feeder lines, they will lose substantial and irretrievable gross income, their franchises may be endangered, and the resulting curtailment of operation will require those petitioners to lay off a substantial number of highly skilled workmen, thereby causing irreparable damage; and

The court further finding that respondent Commission concedes that none of the petitioners is presently in violation of the governing statutes and Commission rules with respect to any of the matters dealt with in the described Commission order, and further finding that the public interest requires that an interlocutory injunction issue, now therefore IT IS

ORDERED, that pending the final disposition of these review proceedings, that portion of the Memorandum Opinion and Order of the Commission released July 25, 1966, as corrected in an Erratum released July 26, 1966, which reads as follows:

"IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26, *supra.*"

is hereby stayed insofar as it would require the named companies to desist from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966; and IT IS

FURTHER ORDERED, that the stay orders entered herein on August 10, 1966, are hereby vacated; and IT IS

FURTHER ORDERED, that if the Commission is so advised, it may apply for an order expediting these review proceedings.

DATED: August 23, 1966.

/s/ FREDERICK G. HAMLEY
/s/ JAMES R. BROWNING
/s/ BEN C. DUNIWAY